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COURT OF APPEALS
DIVISION II

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IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BY 
No. 34714-8-II DEPUTY

WACHOVIA SBA LENDING, INC., d/b/a WACHOVIA SMALL
BUSINESS CAPITAL, a Washington corporation,

Plaintiff/Respondent

vs.

DEANNA D. KRAFT, individually,

Defendant/Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

REPLY BRIEF OF APPELLANT

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I. LEGAL ARGUMENT

This appeal is of the trial court's refusal to hear a request for attorney fees and costs, not a challenge to the amount of fees awarded or not awarded.

This is a well-settled area of the law and is not as complicated as Wachovia suggests. Further, this is not a request for statutory attorney fees under RCW 4.84.330; rather, this is a request for attorney fees and costs under contracts that state attorney fees and costs *shall* be awarded. CP 32, 39 (page 6).

A. THE TRIAL COURT'S FAILURE TO ENTERTAIN A REQUEST FOR ATTORNEY FEES AND COSTS IS REVIEWED DE NOVO EVEN THOUGH THE AWARD ITSELF WOULD HAVE BEEN SUBJECT TO REVIEW FOR ABUSE OF DISCRETION.

The trial court in this matter erred by not even considering a request for attorney fees because it was concerned the issue may, "hang out there for eternity," and because it incorrectly assumed fees would be awardable under CR 41 if the case was ever re-filed. RP 12; *Quality Food Centers v. Mary Jewell T, LLC*, ____ Wn.App. ____, ____ P.3d ____, 2006 WL 2467915 (copy attached) (citing *Farm Credit Bank v. Tucker*, 62 Wn.App. 196, 207, 813 P.2d 619 (1991)); *Hall v. Stolte*, 24 Wn.App. 423, 601 P.2d 967 (1979). Wachovia argues the proper standard of review in this case is abuse of

discretion citing several cases that say *the award of fees and costs* is reviewable for an abuse of discretion. *Beckman v. Wilcox*, 96 Wn.App. 355, 367, 979 P.2d 890, 896-897 (1999). The problem with this argument is that there is no award of fees or costs for this Court to review for abuse of discretion. Typically an award of fees and costs is calculated using the lodestar method. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150, 859 P.2d 1210 (1993). Applying that formula, the trial court must provide a record upon which the appellate court can review the decision. *Estrada v. McNulty*, 98 Wn.App. 717, 988 P.2d 492 (1999). Because this case never got to that point, there is no record for the Court to review for abuse of discretion *as to the amount of fees*. Instead, the proper standard of review is de novo. *Quality Food Centers v. Mary Jewell T, LLC*, ____ Wn.App. ____, ____ P.3d ____, 2006 WL 2467915 (copy attached) (citing *Farm Credit Bank v. Tucker*, 62 Wn.App. 196, 207, 813 P.2d 619 (1991)).

Wachovia argues the decision to award fees (as opposed to the amount of fees) is discretionary and cites *Hawk v. Branjes*, 97 Wn.App. 776, 986 P.2d 841 (1999) and *Walji v. Candyco Inc.*, 57 Wn.App. 284, 787 P.2d 946 (1990). But neither of these cases support that conclusion. The issue in *Hawk* was whether the trial court abused its discretion in awarding the prevailing party court costs when the contract only authorized an award of

attorney fees. We don't have that situation in this case because the contracts between the parties authorize an award of both fees and costs. CP 32, 39 (page 6).

The issue in *Walji* is more on point to the issue presented in this case. There were two potential justifications for awarding fees in that case: (1) an attorney fee clause in a lease, and (2) the statute that allows an award of fees following withdrawal of a request for a trial de novo following an arbitration. The court in *Walji* held that fees under the lease had to be awarded because of the language of the attorney fee clause, but fees under the statute permitting fees following withdrawal of a request for a trial de novo was discretionary based upon the language in the statute. In the present case Kraft is requesting fees under the language of the contracts between the parties, which says that fees shall be awarded. CP 32, 39 (page 6).

Next, Wachovia argues that the trial court did hear Kraft's request for fees but awarded her none, and any arguments to the contrary are, "...flat out wrong." Brief of Respondent, pages 7-8. This argument is not supported by the record. Kraft did not have any evidence of attorney fees or costs incurred available for the trial court to consider. RP 12. The record is clear that Kraft was only asking the court to allow her to file a motion for fees and costs at a later date. RP 11-12. The trial court denied Kraft's request to file a motion at

a later date because the issue, "...may hang out there for eternity if the parties do decide to settle and go away and never inform this Court of that issue."

RP 12. Even assuming for sake of argument that Wachovia is correct and the trial court did actually hear a motion for fees and costs, the lack of an analysis by the trial court of the lodestar factors makes its decision reversible. *Estrada v. McNulty*, 98 Wn.App. 717, 988 P.2d 492 (1999).

The well settled law of Washington is that a defendant is the prevailing party following plaintiff's dismissal of all claims under CR 41, and the court should proceed to determine an award of fees and costs if authorized by contract, statute, or equity. *In the Matter of the Guardianship of Freitas*, 58 Wn.2d 400, 363 P.2d 385 (1961); *Allayari v. Carter Subaru*, 78 Wn.App. 518, 897 P.2d 413 (1995); *Gilman v. MacDonald*, 74 Wn.App. 733, 875 P.2d 697 (1994); *Marassi v. Lau*, 71 Wn.App. 912, 859 P.2d 605 (1993); *In re the Marriage of Fow*, 44 Wn.App. 6, 720 P.2d 850 (1986); *Hall v. Stolte*, 24 Wn.App. 423 P.2d 967 (1979). Even if the standard of review for the decision to hear a request for fees (as opposed to reviewing the amount of fees awarded) is the abuse of discretion standard, it is clear from case law that it is an abuse of discretion to not hear the request at all.

B. THE CHOICE OF LAW ISSUE IS NOT BEFORE THIS COURT, WAS WAIVED BY WACHOVIA, AND THE ISSUE WAS RESOLVED PROCEDURALLY PRIOR TO THIS APPEAL.

Wachovia argues North Carolina law may apply to this case, and without citation to authority argues North Carolina appears to not have a “bilateral attorney fee statute.” Brief of Respondent, page 6-7. However, Wachovia never claimed that North Carolina law applied, and in fact argued it did not. CP 4-6, 76-78.¹ Civil Rule 9 provides (emphasis added):

(k) Foreign Law.

(1) *United States Jurisdictions.* A party who intends to raise an issue concerning the law of a state, territory, or other jurisdiction of the United States shall set forth in his pleading facts which show that the law of another United States jurisdiction may be applicable, or shall state in his pleading or serve other reasonable written notice that the law of another United States jurisdiction may be relied upon.

...

(4) *Failure to Plead Foreign Law.* If no party has requested in his pleadings application of the law of a jurisdiction other than a state, territory, or other jurisdiction of the United States, the court at time of trial *shall* apply the law of the State of Washington unless such application would result in manifest injustice.

¹Wachovia tries to turn the tables on this issue arguing that Kraft claimed North Carolina law applies. It is true Kraft pled lack of jurisdiction in her answer to preserve the defense and raised the issue on summary judgment. But Kraft never made a motion to have North Carolina law apply because she believed she would prevail on the claims under Washington law. See CP 69-72.

Again, Wachovia never pled or argued that any law other than Washington law should apply to this case. Under Washington's rules of civil procedure Wachovia has now waived that argument.

C. ENTRY OF A FINAL JUDGMENT IN FAVOR OF KRAFT AT THE TRIAL COURT LEVEL IS NOT A PREREQUISITE TO AN AWARD OF ATTORNEY FEES AND COSTS AS THE PREVAILING PARTY.

If Kraft were required to have a final monetary judgment entered in her favor as a prerequisite to an award of attorney fees and costs, no defendant (except those who file a counterclaim) could ever be considered a prevailing party for purposes of an attorney fee or cost award under the reasoning suggested by Wachovia. This is because defendants usually "win" cases by avoiding the entry of a monetary judgment against them. Unless a defendant asserts a counterclaim, a defendant usually will not obtain a monetary judgment. Nevertheless, Wachovia relies on *Cork Insulation Sales Co. v. Torgerson*, 54 Wn.App. 702, 775 P.2d 970 (1989) and RCW 4.84.330 to argue that a final monetary judgment is required to be considered a prevailing party.

Wachovia also argues that Kraft must obtain a "final judgment" because she is asking for an award of fees pursuant to RCW 4.84.330, which defines prevailing party as the party who obtains a final judgment. Brief of

Respondent, pages 7, 10-12. This argument overstates the impact of RCW 4.84.330. RCW 4.84.330 does not authorize an award of fees all by itself, and Kraft is not asking for an award of fees solely based upon that statute. Instead, Kraft is asking for an award of fees and costs pursuant to the contracts between the parties. RCW 4.84.330 merely makes the attorney fee provisions in those contracts reciprocal. RCW 4.84.330.

In any event Wachovia seems to overlook the fact that the reasoning in *Cork* that it relies upon for the rule it advocates (that a final judgment is required) was specifically distinguished in *Allahayari v. Carter Subaru*, 78 Wn.App. 518, 897 P.2d 413 (1995). The court in *Allahayari* observed,

The reason that an order of voluntary dismissal is not a final judgment is for the protection of plaintiffs by allowing the litigation to continue under certain circumstances. It is not for the purpose of precluding attorney fees to a defendant who has "prevailed" as things stand at that point.

Allahayari, 78 Wn.App. at 522-523 (citing *Walji v. Candyco, Inc.*, 7 Wn.App. at 289, 787 P.2d 946). The court went on to say,

...we find it inappropriate to use the fact that a voluntary dismissal is not a final judgment as a ground upon which to deny attorney fees to a defendant upon the plaintiff's voluntary dismissal of its action.

Allahayari, 78 Wn.App. 524.

It is true that the *Allahayari* case involved interpretation of the statute authorizing fees in cases involving \$10,000 or less, but this is a distinction

without a difference. The principles remain the same. This same rule has been applied when interpreting attorney fee provisions contained in contracts. *Marassi v. Lau*, 71 Wn.App. 912, 859 P.2d 605 (1995).

D. WACHOVIA SHOULD NOT BE AWARDED FEES ON APPEAL IF IT PREVAILS.

After arguing that fees are not proper in this case and that we don't know whether Washington or North Carolina law applies, Wachovia makes a somewhat odd request for an award of fees on appeal if it prevails. Wachovia's request is based upon "...RCW 4.84.330 and the loan documents at issue." Brief of Respondent, page 12. But if Wachovia prevails in convincing this court that such law does not apply, it has also defeated its own request for attorney fees. Therefore, if Wachovia prevails on appeal, it must also be denied fees.

What is interesting about Wachovia's request for attorney fees is what is evident from reviewing the record in the trial court. When Wachovia filed its motion for summary judgment, it felt it was necessary and proper that it be awarded its own attorney fees and costs as the prevailing party, including those it incurred in pursuing Ms. Kraft's former spouse through bankruptcy court and foreclosure. CP 14-18, 45, 48. The basis for this request was the loan documents upon which Ms. Kraft is now making her request. But when

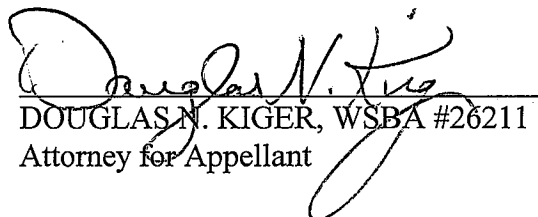
Wachovia chose on the eve of trial to request a voluntary non-suit, it became, "...a matter of equity..." for each party to bear their own fees and costs. RP 13. In fact, on appeal, Wachovia argues an award of fees to it on appeal, "...is in harmony with principles of fundamental fairness and equitable considerations given the particular circumstances of this case." Brief of Respondent, page 12. For a large company like Wachovia it may seem equitable that each party bear their own costs when it decides to abandon its claims shortly before trial; but that is not an equitable outcome for a single individual such as Ms. Kraft where the contracts between the parties provide for an award of fees and costs to the prevailing party.

II. CONCLUSION

Ms. Kraft respectfully requests that this court reverse the trial court's decision denying her request to present a request for attorney fees, remand the matter for entry of an award of attorney fees and costs by the trial court, and that this Court award her attorney fees and costs on appeal.

DATED this 22 day of September, 2006.

BLADO, STRATTON & KIGER, P.S.


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CERTIFICATE OF SERVICE

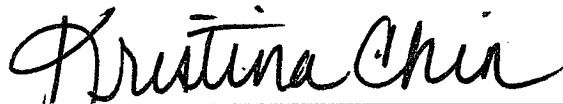
STATE OF WASHINGTON

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 21st day of September, 2006, she placed with ABC Legal Messengers, Inc. an original and one copy of Reply Brief of Appellant and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same for delivery to the following party and its counsel of record:

RESPONDENT	ATTORNEY FOR RESPONDENT
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DATED this 21st day of September, 2006, at Tacoma, Washington.

BLADO, STRATTON & KIGER, P.S.



Kristina Chin, Paralegal

Quality Food Centers v. Mary Jewell T, LLC

_____ Wn. App. _____, _____ P.3d _____, 2006
WL 2467915

Westlaw.

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--- P.3d ---, 2006 WL 2467915 (Wash.App. Div. 1)
(Cite as: --- P.3d ---)

Only the Westlaw citation is currently available.

Court of Appeals of Washington, Division 1.
QUALITY FOOD CENTERS, a division of Fred
Meyer Stores, Inc., an Ohio Corporation,
Respondent,
v.
MARY JEWELL T, LLC, a Washington limited
liability Company, and Appellant,
Javart Studio, a partnership, Defendant.
No. 56674-1-I.

Aug. 28, 2006.

Background: Commercial tenant sued landlord for alleged breach of lease. After bench trial, the Superior Court, King County, Steven Gonzalez, J., entered judgment for landlord, but denied landlord's motion for attorney fees. Landlord appealed.

Holding: The Court of Appeals, Appelwick, C.J., held that attorney fees provision in lease was unilateral, and thus landlord was entitled to fees under reciprocal statute.

Reversed and remanded with directions.

[1] Costs 102 ⚡ 194.34

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.34 k. Leases. Most Cited Cases

Attorney fee provision in commercial lease, providing that party breaching lease was required to pay attorney fees, was unilateral, since party accused of breach could not recover fees, and thus landlord who successfully defended tenant's breach of lease action was entitled to attorney fees under statute making attorney fees provision bilateral. West's RCWA 4.84.330.

[2] Costs 102 ⚡ 194.16

102 Costs

102VIII Attorney Fees

102k194.16 k. American Rule; Necessity of Contractual or Statutory Authorization or Grounds in Equity. Most Cited Cases

The general rule is that parties may not recover attorney fees except under a statute, contractual obligation, or some well-recognized principle of equity.

[3] Costs 102 ⚡ 194.32

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.32 k. Contracts. Most Cited Cases

Costs 102 ⚡ 194.34

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.34 k. Leases. Most Cited Cases

The remedial purpose behind the enactment of the statute on attorney fees provisions in a contract or lease is that unilateral attorney fees provisions be applied bilaterally. West's RCWA 4.84.330.

[4] Appeal and Error 30 ⚡ 984(5)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k984 Costs and Allowances

30k984(5) k. Attorneys' Fees. Most Cited Cases

Costs 102 ⚡ 194.32

102 Costs

102VIII Attorney Fees

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102k194.24 Particular Actions or Proceedings
102k194.32 k. Contracts. Most Cited Cases

Costs 102  194.34

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.34 k. Leases. Most Cited Cases

While the amount awarded under the statute on attorney fees provisions in a contract or lease is reviewed for abuse of discretion, the language is mandatory in requiring an award of fees. West's RCWA 4.84.330.

While the amount awarded under the statute on attorney fees provisions in a contract or lease is reviewed for abuse of discretion, the language is mandatory in requiring an award of fees. West's RCWA 4.84.330.

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Christina L. Haring, Stevan D. Phillips, Margarita V. Latsinova, Stoel Rives LLP, Seattle, WA, for Respondent.

APPELWICK, C.J.

*1 ¶ 1 Quality Food Centers (QFC) sued Mary Jewell T, LLC (MJT), alleging MJT had breached the lease between the parties. MJT successfully defended the suit, but when it requested its attorney fees pursuant to the lease and RCW 4.84.330, the court denied them. The lease provided that if either party incurred attorney fees as a result of a breach of the lease, the breaching party would pay the other party's fees. We hold that the attorney fees provision in the lease is unilateral, and therefore RCW 4.84.330 is triggered. As the prevailing party, MJT is entitled to its fees. We reverse and remand for an award of fees.

FACTS

¶ 2 Mary Jewell T, LLC (MJT) owns a commercial property in which Quality Food Centers (QFC) rents retail space. QFC brought a lawsuit against MJT and another tenant of the property, alleging MJT had breached the parties' lease by allowing the other tenant to operate as a beverage shop.^{FN1}

¶ 3 After a bench trial, the court ruled for MJT. MJT then moved for an award of its attorney fees under RCW 4.84.330 and the parties' lease. The attorney fees provision of the lease provided:

In the event either party to this Lease incurs attorney's fees as a result of the breach of this Lease by the other party, whether suit is commenced or not, the breaching party shall pay the other party's reasonable attorneys' fees incurred as a result of the breach of this Lease by the other party, whether suit is commenced or not and, if suit is commenced, the costs of the prevailing party in such suit. Said fees include those incurred on appeal and in any bankruptcy proceeding.

QFC opposed the motion for fees. The trial court denied the motion. MJT appeals.

ANALYSIS

I. Applicability of RCW 4.84.330

[1] ¶ 4 MJT asserts that it is entitled to attorney fees for successfully defending QFC's breach of contract claim. MJT claims that RCW 4.84.330 requires a fee award. QFC counters that RCW 4.84.330 is not applicable to the attorney fees provision in the parties' lease because the provision is already reciprocal.

[2][3][4] ¶ 5 The general rule in Washington is that parties may not recover attorney fees except under a statute, contractual obligation, or some well-recognized principle of equity. *N. Pac. Plywood v. Access Rd. Builders*, 29 Wash.App. 228, 236, 628 P.2d 482 (1981). RCW 4.84.330 provides, in relevant part:

In any action on a contract or lease entered into after September 21, 1977, where such contract or

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(Cite as: --- P.3d ----)

lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

...

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

*2 The remedial purpose behind the enactment of RCW 4.84.330 is that unilateral attorney fees provisions be applied bilaterally. *Herzog Aluminum, Inc. v. General Am. Window Corp.*, 39 Wash.App. 188, 196-97, 692 P.2d 867 (1984). The interpretation of an unambiguous contract and the interpretation and applicability of a statute are generally issues of law we review de novo. See *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wash.App. 416, 420, 909 P.2d 1323 (1995) ("[i]nterpretation of an unambiguous contract is a question of law"); *W.R.P. Lake Union Ltd. P'ship v. Exterior Svcs.*, 85 Wash.App. 744, 749, 934 P.2d 722 (1997) ("interpretation and construction of a statute is a question of law that we review de novo"). And while the amount awarded under RCW 4.84.330 is reviewed for abuse of discretion, the language is mandatory in requiring an award of fees. *Farm Credit Bank v. Tucker*, 62 Wash.App. 196, 207, 813 P.2d 619 (1991).

¶ 6 In essence, QFC argues that the phrase "one of the parties" in the statute means one named party, such as if the contract provided that only QFC would get fees if it sued on the contract. QFC asserts that the lease here is already bilateral because it does not specifically name one party but provides for potentially either party to get fees. Therefore, QFC claims, the statute does not apply. But MJT argues that RCW 4.84.330's phrase "one of the parties" applies here when only the party who sues on the contract and prevails can be awarded fees. In essence, MJT argues, the provision here is unilateral.

¶ 7 MJT is correct. The fee provision here provides that the breaching party must pay the other party's attorney fees incurred as a result of the

breach of the lease. A party accused of breach could never recover attorney fees, no matter how frivolous the action. Admittedly, the lease does not say that only the landlord or only the tenant can recover fees. Regardless of who was accused of breach, the other party could recover fees if it was successful. However, it is the one-sidedness of the availability of fees in the particular controversy that makes the provision unilateral.

¶ 8 Because the provision is unilateral, it triggers RCW 4.84.330. RCW 4.84.330 requires that fees be made available to either party to the controversy or to neither party. The parties may not contract to avoid this statutory requirement. Thus, RCW 4.84.330 mandates that MJT be awarded its fees and costs incurred in successfully defending the breach of lease claim.

II. Attorney Fees on Appeal

¶ 9 MJT requests its attorney fees on appeal under RAP 18.1 and RCW 4.84.330. If applicable law grants the party the right to recover reasonable attorney fees and expenses on review, the party must request the fees in its brief. RAP 18.1. "A contractual provision for an award of attorney fees at trial supports an award of attorney fees on appeal." *Reeves v. McClain*, 56 Wash.App. 301, 311, 783 P.2d 606 (1989). As RCW 4.84.330 allows for fees below, we grant MJT's request for its reasonable attorney fees on appeal.

*3 ¶ 10 We reverse and remand to the trial court for determination and award of MJT's reasonable attorney fees accrued below and on appeal.

WE CONCUR: SCHINDLER, A.C.J., and Baker, J.

FN1. MJT had initially brought counterclaims against QFC, but dismissed these counterclaims without prejudice.

Wash.App. Div. 1, 2006.

Quality Food Centers v. Mary Jewell T, LLC

--- P.3d ----, 2006 WL 2467915 (Wash.App. Div. 1)

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